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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF:

MANDALAY SHORES COOPERATIVE HOUSING ASSOCIATION, INC., A Nonprofit Section 501(c)(3) Cooperative Housing Corporation of the State of Florida,
Petitioner,

vs.

SAMUEL R. PIERCE, JR., Secretary of Housing and Urban Development, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this suit which involves the national policy of the United States Department of Housing and Urban Development ("HUD") with respect to the disposition and sale of HUD-held multifamily projects and more specifically HUD's policy of refusing to implement its statutory obligation to encourage cooperative home ownership for elderly, low- and moderate-income tenants and to avoid unnecessary displacement of such tenants—

1. Is the decision below in conflict with the Ninth Circuit case of *Russell* v. *Landrieu*, in determining HUD's statutory responsibilities?

2. Is the denial of judicial review by the decision below of the HUD October 1, 1979 interim regulation, 24 CFR Part 290 and Section 246 of the Act in conflict with the decisions of this Court and other circuits?

3. Is the court below in conflict with the decisions of this Court and other circuits by failing to reverse its decision when later HUD regulatory change nullified the Eleventh Circuit's grounds for decision?

PARTIES

The respondents are Samuel R. Pierce, Jr., Secretary of U.S. Department of Housing and Urban Development, in place of Moon Landrieu, former Secretary; Lawrence B. Simons, former Assistant Secretary for Housing—FHA Commissioner; and Everett H. Rothschild, former Area Manager, Jacksonville, Florida, Area Office of HUD, in their official capacity.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated February 18, 1982, is reported at 667 F.2d 1195 (1982) and is reproduced in the Appendix at 1a.

The opinion of the United States Court for the Middle District of Florida, Tampa Division, dated April 2, 1981, is unreported and is reproduced in the Appendix at 4a.

The decisions of the United States Court of Appeals for the Eleventh Circuit denying the petitions for rehearing and for rehearing *en banc* are by an unreported order, without opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 18, 1982. Timely petitions for rehearing were denied on June 7, 1982, by an unreported order, without opinion.

This Petition for Writ of Certiorari was filed within ninety (90) days following that date.

STATUTES AND REGULATIONS INVOLVED

This petition involves five statutes and two regulations:

(1) Sec. 246, National Housing Act (the "Act"), 12 USC § 1715z-11, which authorizes the Secretary of HUD to sell HUD-owned projects to nonprofit tenant cooperatives, such as Petitioner, for a negotiated price with 100% mortgage financing.

(2) Administrative Procedure Act ("APA"), 5 USC §§ 551-553, 702-706, which sets standards for administrative rule-making and which provides for judicial review of administrative actions.

(3) 42 USC § 3535(o)(3) which imposes specific requirements on HUD's administrative rule making, over and above and in addition to APA requirements. HUD interim regulations (such as the October 1, 1979 interim regulation in this case) are invalid and inoperative unless and until issued as final regulations.

(4) 12 USC § 1713(1), which authorizes HUD to sell HUD-owned projects such as Mandalay Shores project.

(5) 12 USC § 1701z-11, a mandatory direction to HUD that in all cases where practicable, HUD-owned projects must

be sold either for nonprofit cooperative ownership or for rental housing (as distinguished from condominium conversion or other uses).

(6) HUD's original regulations issued January 29, 1977, pursuant to Section 246 of the Act, which provide for disposition of HUD-owned multifamily projects by negotiated sale to cooperatives. 42 F.R. 5049, 24 CFR Part 290, Sec. 290.60 (April 1, 1977 ed., April 1, 1978 ed., and April 1, 1979 ed.)

(7) HUD's interim regulations issued October 1, 1979, which, without explanation, purport to revoke HUD's original regulations and retroactively make Petitioner Cooperative ineligible for a negotiated sale under Sec. 246 of the Act. 44 F.R. 56609, 24 CFR Part 290, Sec. 290.53 (April 1, 1980 ed. and April 1, 1981 ed.)

STATEMENT OF THE CASE

Mandalay Shores Apartments (the "Project"), FHA Project No. 067-00016, is a high-rise, 386 unit rental property, located in Clearwater, Florida directly on the Gulf of Mexico within close proximity to downtown Clearwater Beach. The City of Tampa is within easy access for needed services. The Project was built in 1963 with a $7,170,900 mortgage, insured by HUD under Sec. 207 of the National Housing Act (the "Act"), 12 USC § 1713.

The Project was twice unsuccessful as a rental property. In 1977 HUD acquired title to it for the second time by a deed in lieu of foreclosure.

In August 1979, HUD's Jacksonville, Florida office announced to the tenants that HUD intended to sell the Project for conversion to a condominium. The tenants were upset because a condominium conversion was a grave threat to their continued occupancy. Almost all residents were elderly and lived on fixed incomes. Approximately 40 had "low" incomes—small enough to qualify for housing subsidy assistance payments from HUD under its Section 8 program. They were convinced that they could not buy their apartments in a

condominium conversion because required down payments, plus increased monthly payments for purchase and operation, would place the housing beyond their means.

The tenants protested to HUD, which assured them that HUD would consider their offer to buy the Project as a nonprofit cooperative. Relying upon this assurance, in August 1979, the tenants organized Mandalay Shores Cooperative Housing Association, Inc. (the "Cooperative") to achieve nonprofit affordable cooperative housing under Sec. 246 of the Act (12 USC 1715z-11), applicable HUD regulations, and under the Older Americans Act of 1965, 42 USC 3001, *et seq.* The Cooperative also qualified under Section 501(c)(3) of the Internal Revenue Code as a nonprofit organization exempt from federal income tax. Under Florida law, this meant that the Cooperative would be exempt from real estate and excise taxes and be able to supply housing at lower cost than a profit-motivated landlord. When the Cooperative was organized, 340 families lived in the Project; 280 promptly joined the Cooperative and contributed approximately $900,000 for down payments and other costs of a negotiated purchase.

COOPERATIVE'S EFFORTS TO NEGOTIATE

It is undisputed that in August 1979, when the Cooperative made its first effort to purchase the Project from HUD, the Cooperative qualified for a negotiated sale under Sec. 246 of the Act, 12 USC § 1715z-11 and the HUD regulations promulgated in 1977. Under this statute and regulations, Cooperative was eligible to buy at a negotiated price determined on the basis of the value of the Project for continued use as a cooperative, rather than by a capitalization of income. Also, the Cooperative was eligible to receive financing covering 100% of the acquisition price, which included funds required to complete badly needed repairs and rehabilitation of the Project and costs of organizing the Cooperative and selling the units.

On August 20, 1979, officers of the Cooperative met in Washington, D.C. with HUD's Deputy Assistant Secretary Marilyn Melkonian, and other senior HUD officials. At that

time HUD clearly recognized that it had the legal right under Sec. 246 to negotiate a sale of the Project to the Cooperative. Indeed, the Cooperative was assured that HUD would negotiate exclusively with it for the sale of the Project under Sec. 246.

At the August 20, 1979 meeting, the Cooperative delivered an offer to buy the Project for $7,500,000, together with a good faith deposit of $100,000. The Cooperative thereafter sought, without success, to induce HUD to conduct meaningful negotiations. Instead, on October 1, 1979, HUD took regulatory action which, if legally valid, would destroy the Cooperative's right to purchase the Project. On October 1, 1979, HUD published in the Federal Register a new "interim regulation" which, for the first time, provided that HUD would negotiate sales to cooperatives under Sec. 246 *only* where the Project being sold was *formerly subsidized.* Since this Project had not been formerly subsidized, Cooperative was disqualified under Sec. 246. The October 1, 1979 "interim regulation" made no explanation or justification for revocation of the existing regulation which permitted a sale under Sec. 246 whether or not a project had been formerly subsidized. Moreover, the "interim regulation" did not even attempt to explain or justify why it was made to apply retroactively and thus effectively disqualify the Cooperative from purchasing the Project under Sec. 246.

By letter dated February 12, 1980, HUD informed the Cooperative that its offer to buy the Project was rejected because under the "interim regulation" HUD no longer had authority to negotiate a sale of this Project to the Cooperative.

Following receipt of HUD's rejection, the Cooperative filed suit on March 21, 1980. The Cooperative requested a declaratory judgment that HUD had illegally refused to negotiate with the Cooperative for the sale of the Project; also, that the Court enjoin HUD's sale of the Project pending a decision on the Cooperative's rights. The Cooperative took the position that HUD acted arbitrarily and capriciously and in violation of its statutory duty under Sec. 246: (a) in refusing to consider on the merits a sale of the Project to the Cooperative and (b) in changing the rules by imposing new interim conditions of

eligibility which HUD knew the Cooperative could not satisfy. The Cooperative also alleged that HUD's wrongful conduct estopped it from refusing to negotiate with the Cooperative in good faith.

PROPERTY DISPOSITION REPORT

On September 30, 1980, HUD's Property Disposition Committee approved a report with respect to disposition of the Project. The report treated the interim regulation as in full force and effect and precluding a negotiated sale to the Cooperative. The report favored sale of the Project by competitive bid as a rental project. The report did not consider whether the policies of the Act would be served by sale to a nonprofit cooperative; nor did the report discuss the merits of objections made by the Cooperative that the tenants were not adequately being protected against condominium conversion and unwarranted displacement. (HUD delayed its formal announcement to sell the Project as a rental project until November 6, 1980, and admitted that public announcement of the decision to sell to a real estate operator had been deliberately withheld until after the presidential election).

Between September 30, 1980 and November 6, 1980, HUD responded to inquiries of U.S. Senators Lawton Chiles and Richard Stone of Florida stating that HUD had not yet reached a decision on the disposition of the Project and was working as quickly as possible toward a decision.

On October 8, 1980 (almost a month before HUD's public announcement), 12 USC §1701z-11 was amended to require that HUD-held projects be sold whenever feasible either as a rental project or for cooperative ownership. Each alternative was given equal weight, and HUD was under statutory mandate to consider in good faith the alternative of cooperative disposition. HUD never carried out this legislative mandate.

DISTRICT COURT DECISION

On April 2, 1981, HUD's motion for summary judgment was granted by the District Court. It discussed the October 1, 1979 interim regulation but refused to rule on its validity. Instead, the District Court relied on the September 30, 1980 report of the Property Disposition Committee.

The District Court refused to rule on the issue of HUD's arbitrary refusal to sell projects to cooperatives under Sec. 246; only one project had been sold thereunder since 1974. The Court said this was a matter to be taken up with the Congress.

The District Court did not discuss the Cooperative's count in the complaint that HUD was equitably estopped to refuse to negotiate.

ELEVENTH CIRCUIT DECISION

The Eleventh Circuit affirmed the District Court on February 18, 1982, but did not determine whether the contested interim regulation was valid. Like the District Court, the Appellate Court said it need not decide the validity of the challenged regulation.

The Eleventh Circuit did not discuss HUD's alleged arbitrary refusal to administer Sec. 246.

As to the count in the complaint on equitable estoppel, the Eleventh Circuit ruled against the Cooperative because it had not dealt with HUD contracting officers. The Eleventh Circuit said the authority to sell was vested in the Property Disposition Committee, which signed the report of September 30, 1980.

On petition for review, the Cooperative showed that statutory authority to sell was in the Secretary and, by delegation, in the Assistant Secretary, and not in the Committee which was set up as a convenient administrative tool. While decision on the petition was pending, the Cooperative moved the Eleventh Circuit to take notice that on May 5, 1982, the Assistant Secretary issued new interim regulations which abolished the Property Disposition Committee (47 F.R. 19471).

On June 7, 1982, the Appellate panel turned down the Cooperative's petitions for review and denied HUD's motion to strike the additional material submitted by Petitioner.[1]

REASONS FOR ALLOWING THE WRIT

INTRODUCTION

The Eleventh Circuit declined to rule on HUD's alleged arbitrary and capricious procedural conduct in administering the property disposition program for HUD-held projects. This introduction presents background information needed for evaluation of that decision.

Prior to enactment in 1974 of Sec. 246, Congress had become dissatisfied with HUD's disposition program. HUD

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[1] The HUD disposition program sought to sell the Project by competitive bid and to impose requirements that it be continued for a period of time (up to 20 years) as a rental project. Although this is not part of the official record below, for the Court's interest it should be noted that the Project was sold on or about March 5, 1982. The documents placed of record indicate that the sale of the Project was not to the high bidder, but was to the "Bank of Clearwater, a Florida banking corporation, as trustee under Trust Agreement dated March 1, 1982, Trust No. 48-1990-00." Defendant Samuel R. Pierce, Jr., Secretary of HUD entered into an "acquisition and reacquisition agreement" dated as of March 3, 1982 with said bank, as trustee, which provided for a reconveyance by the Purchaser to the Seller and indemnification and holding harmless the Purchaser in the event thereof, including against the defects in title in connection with any of the pending suits and "any and all causes of action arising in the future from the same set of facts which gave rise to the suits." There presumably are other documents in connection with the transaction and the above-mentioned information is obtained solely from documents which were put of record in Pinellas County on March 5, 1982.

The sale of the Project and the creation of intervening rights of third parties may present a serious problem of equitable remedies. However, it does not make this suit moot in the Article III sense. Relief can be given in some form. *Shannon* v. *U.S. Department of Housing and Urban Development*, 436 F.2d 809, 822 (3rd Cir. 1970). The existence of the hold-harmless agreement makes it simpler to grant equitable relief. The Purchaser took the Project subject to *lis pendens* duly filed and had full actual notice of this suit and Cooperative's claims. In any event, this suit is no less appropriate a means for obtaining judicial review, even though it may be difficult to fashion equitable relief. *Shannon* v. *HUD*, *supra*, at p. 822.

obtained competitive bids and sold HUD-held projects for the highest price to reimburse HUD's mortgage insurance funds. Although the achieving of the highest sales price is a worthy goal, Congress legislated that there are other goals which HUD must consider. These goals include maintaining the property during the HUD ownership as decent, safe and sanitary housing; avoiding undue tenant displacement by purchaser through converting the property into high-priced condominium or rental housing; and encouraging affordable home ownership by the tenants through nonprofit housing cooperative ownership under Sec. 246.

HUD failed or refused to sell projects to cooperatives under Sec 246. From 1974 to 1981, only one project, of hundreds of projects sold by HUD during that period, was sold to a cooperative under Sec. 246. In 1977 HUD issued regulations under Sec. 246 which permitted negotiated sale to a cooperative of any project, whether or not formerly subsidized by HUD. However, HUD made no effort to sell to cooperatives. The 1977 regulation did not involve the use of the Special Assistant for Cooperative Housing, a statutory position enacted in 1955, which position, like the Secretary, is one of the few statutory officials in HUD. 12 USC § 1715(e). The Special Assistant is charged specifically with fostering housing cooperatives under Sec. 246.

Despite Sec. 246 and the 1977 regulations, HUD failed or refused to sell to cooperatives. Thus, in August 1979, the tenants of Mandalay Shores Apartments sought to purchase the Project, using the very valuable property rights under Sec. 246. HUD at first encouraged them. Later, HUD reverted to its accustomed opposition to Sec. 246. On February 12, 1980, HUD rejected the Cooperative's offer, stating that HUD had no authority to negotiate a sale to the Cooperative because of the retroactive revocation of earlier regulations by an interim regulation published October 1, 1979, in the midst of Cooperative's efforts to buy.

Six months after suit was filed in March, 1980, HUD's Property Disposition Committee, on September 30, 1980, signed a report which supported HUD's February 12, 1980 rejection. The court below erroneously accepted the *post hoc*

rationalizations in the report as reasons for not deciding the validity of the challenged October 1, 1979 regulation. In particular, the Eleventh Circuit accepted HUD's argument that HUD's discretion was unreviewable because Sec. 246 was a precatory statute.

The court below did not rule on the mandatory statute which also governed HUD's management and disposition of HUD-held projects. 12 USC §1701z-11. This statute mandated that HUD should decide in each disposition whether to sell the project to a cooperative. HUD admittedly failed to weigh such a sale of this Project to the Cooperative. Thus, the Eleventh Circuit erroneously ruled that HUD's discretion was unbridled under a precatory statute and ignored a mandatory statute which HUD flouted with impunity.

The tenants took every needed step to qualify under Sec. 246, a statute intended to benefit tenants who organized nonprofit corporations to buy the HUD-held project in which they lived. Their right to purchase is supported by the statutory policy that HUD should encourage home ownership by its tenants. Twenty of the tenants qualified for Sec. 8 housing assistance payments for low income families, a protected right. *Goldberg* v. *Kelly*, 397 U.S. 254, 261-263 (1970). The tenants were almost all, if not all, older Americans and the Older Americans Act declared it to be the duty of the Federal Government to assist older Americans to obtain suitable housing available at costs which they can afford. 42 USC 3001, subpar. 3.

The tenants organized the Cooperative in August 1979 in response to HUD's initial encouragement. 80% of the tenants joined and raised $900,000 in a few days for the Cooperative purchase—a most convincing proof of overwhelming interest in nonprofit ownership. The tenants convinced the Internal Revenue Service that the Cooperative would operate in such a nonprofit manner as to qualify for tax exemption under Sec. 501(c)(3) of the Internal Revenue Code of 1954 as a charitable organization. This exemption is far more than was required under Sec. 246. Most HUD cooperatives qualify as nonprofit, but few, if any, as tax exempt under Sec. 501(c)(3).

HUD's highest level officials encouraged the tenants to organize the Cooperative to buy the Project under Sec. 246 and then stated their hands were tied by the contested interim regulation. HUD caused deep disillusionment among the tenants and dissension and law suits which forced the Cooperative to seek the protection in bankruptcy of Chapter XI.

HUD had long before ceased to repair the Project, despite incontestable evidence of a clear and present danger from asbestos. HUD refused to comply with an order by the Clearwater (Florida) Code Enforcement Board to abate the nuisance, disregarding its statutory duty to maintain the Project as decent, safe and sanitary housing. 12 USC 1701z-11(a).

HUD argued that the Cooperative did not represent the tenants, disregarding that HUD caused the dissension; that HUD need not comply with its mandate under 12 USC 1701z-11 to consider sale to the Cooperative because the amendment was effective October 8, 1980, and the Property Disposition Report was dated September 30, 1980 and was a final action—in so arguing, HUD disregarded that it had written to U.S. Senators Chiles and Stone after October 8, 1980, stating no final decision had yet been reached.

Despite the convincing showing that HUD had unclean hands and was not entitled to equitable relief, and the clear evidence of substantial genuine issues of material fact, the decisions below allowed HUD to avoid judicial review of its administration of the statutory disposition program. HUD's administration is arbitrary and capricious and contrary to law, and this Court should determine that HUD is required to comply with the other applicable decisions which conflict with the decision below.

I

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *RUSSELL V. LANDRIEU*

Russell v. *Landrieu*, 621 F. 2d 1037 (1980), like this case, involved a suit by tenants as to HUD's disposition of a HUD-held project. HUD argued that its only responsibility in the proposed disposition was to obtain the highest dollar price. The Ninth Circuit rejected this argument and held that HUD's disposition responsibilities were much broader—that HUD was under an obligation to formulate a disposition program which took into consideration the various housing policies and objectives (including protection of tenant occupancy) of the National Housing Act. The Ninth Circuit emphasized that HUD must exercise its administrative discretion on the proposed sale in the light of the broad range of objectives and priorities prescribed by the Act.

The decision in *Russell* v. *Landrieu* was clearly correct in holding that HUD could not lawfully pick one statutory goal and disregard all others; and that HUD was required to weigh fairly all relevant facts so as to comply with all statutory requirements in deciding on a particular sale. It is submitted that a writ of certiorari should be granted in this case to assure that this principle will be consistently applied in all circuits. The disposition of HUD-held projects has far-reaching effects on many people. HUD's disposition policies affect the rights of thousands of tenant occupants in HUD-held projects. Their rights to assure continued occupancy, avoid being displaced and to achieve affordable home ownership under Sec. 246 are matters of great importance and justify consideration of this issue by the Supreme Court.

The court below approved a disposition program where HUD refused to consider the statutory option of sale to a cooperative as authorized in Sec. 246 and mandated in Sec. 1701z-11. Sec. 246 provides for the disposition of HUD-held projects to nonprofit cooperatives as part of the broad congressional housing policy of encouraging home ownership. Sec. 246

specifically authorizes HUD to grant favorable financing to the purchasing cooperative and to agree upon a sales price through negotiation rather than competitive bid. Although the Cooperative specifically requested that HUD sell the Project to it and raised $900,000 in cash from over 80% of the tenants, HUD never considered the merits of a possible sale to the Cooperative. Instead, HUD adopted an "interim regulation" which by its terms disqualified the Cooperative from eligibility as a purchaser under Sec. 246. The Eleventh Circuit failed to hold that HUD was under legal obligation to examine the merits of sale to a nonprofit cooperative as one of HUD's options.

This decision is squarely in conflict with *Russell* v. *Landrieu*. HUD's disposition program should not have been approved by the court below where, as here, HUD refused to take into account in the decision-making process the disposition alternative to a nonprofit tenants cooperative.

II

THE DECISION BELOW USED STANDARDS FOR JUDICIAL REVIEW WHICH ARE IN CONFLICT WITH THOSE OF THIS COURT AND OTHER CIRCUITS

The decision below presents two major conflicts with the standards for judicial review of this Court and other circuits: (1) as to the challenged HUD interim regulation of October 1, 1979; and (2) as to HUD's arbitrary and capricious administration of Sec. 246.

A. The Challenged HUD Interim Regulation of October 1, 1979

1. Standards Used by Court Below

The court below used erroneous standards in reviewing whether this regulation was arbitrary and capricious and promulgated contrary to law. The Eleventh Circuit affirmed the District Court's erroneous decision that it need not decide the validity of the contested regulation which implemented Sec.

246, a discretionary statute; and accordingly, refused to review the charges that the promulgation of the regulation was contrary to HUD's own administrative procedure and that of the APA and conflicted with decisions of this Court and other circuit courts.

Judicial review will obtain as to actions under discretionary statutes like Sec. 246. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *Citizens to Protect Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971); *Ass'n of Data Processing Org'ns* v. *Camp*, 397 U.S. 150, 156-7 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 165-7 (1970).

If the statute itself clearly and convincingly so states, the courts will deny judicial review. This is not the case here. Most operative provisions of the Act are precatory and contain authorizing provisions, not mandatory provisions. Yet, case after case held that HUD's actions under the Act were judicially reviewable. *Russell* v. *Landrieu*, 621 F.2d 1037, 1041 (9th Cir. 1980) sale of HUD-held project; *Ross* v. *Community Services, Inc.*, 544 F.2d 514 (4th Cir. 1976), aff'g 405 F. Supp. 831 (D. Md. 1975)—assistance payments; *Shannon* v. *HUD*, 436 F.2d 809, 819 (3rd Cir. 1970)—urban renewal; *Abrams* v. *Hills*, 547 F.2d 1062, 1067 (9th Cir. 1976)—operating subsidy.

The decision below unreasonably relied on the Property Disposition Committee ("PDC") report of September 30, 1980, despite the fact that it was signed six months after HUD's final rejection of negotiated sale to the Cooperative and in no way reconsidered that rejection was made because of the contested regulation. The decision below granted undue judicial deference to HUD's belated efforts to rationalize its arbitrary decisions. Such deference is in conflict with this Court's decisions. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-45 (1976) holding there is less ground for judicial deference where, as here, the agency took inconsistent positions in promulgating interpretive regulations; *Int'l Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 (1979) which held that deference is constrained by the Court's obligation to honor the

clear meaning of a statute, as revealed by its language, purpose and history.[2]

In the instant case, the statute, the original regulation, the HUD operating procedure and manuals, and the legislative history all were clear and definite. HUD had authority to sell HUD-held projects to cooperatives, whether or not formerly subsidized, and was supposed to make such sales an important part of its disposition program—not a unique occurrence every seven years.

Further, the decision below gave overwhelming deference to HUD's belated efforts to improve the record, after HUD had slammed the door on the Cooperative on February 12, 1980. This Court held that *post hoc* rationalizations and belated justifications are to be used with great caution and discounted in judging agency actions. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also, Ace Motor Freight, Inc.* v. *I.C.C.*, 557 F.2d 859, 864 (D.C. Cir. 1977); *Local 777 Democratic U. Organizing Com.* v. *N.L.R.B.*, 603 F.2d 862, 912 (D.C. Cir. 1978); *Campbell Sixty-Six Express, Inc.* v. *I.C.C.*, 603 F.2d 1012, 1014 (D.C. Cir. 1979). These rules are especially applicable here because HUD never examined the merits of selling the Project to the Cooperative, either before or after its February 12, 1980 rejection. The PDC report contains only excuses for refusing to consider such sale and arguments why the sale as rental property is acceptable. HUD never weighed the relative merits of sale to Cooperative as compared to its so-called rental disposition.

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[2] The Cooperative claimed that the District Court also misapplied the rules for deciding HUD's motion for summary judgment. Under the ordinary rules, the material facts as alleged and averred by the Cooperative, where opposed by HUD, should have been treated as proving a genuine issue of material fact. Summary judgment should have been denied. *Wright, Miller & Cooper, Federal Practice and Procedure* (1978) Sec. 2725. Instead HUD's allegations and averments were accepted as correct and HUD was granted summary judgment.

This Court has held that the judicial review of agency actions should determine that the agency followed proper administrative procedure consistent with the governing legislation and its own regulations. *Morton* v. *Ruiz*, 415 U.S. 199, 232-5 (1974); *U.S.* v. *Nixon*, 418 U.S. 683, 694-696(1974); *U.S.* v. *Caceres*, 440 U.S. 741, 751 n. 14 (1979). HUD argued that its actions should be granted judicial deference, citing *Vermont Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council*, 435 U.S. 519 (1978). There, this Court stated: "Administrative decisions should be set aside. . . only for substantial procedural or substantive reasons as mandated by statute, *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966), not simply because the court is unhappy with the result reached." 435 U.S. at 558.

The decision below did precisely the reverse of the holding in *Vermont Yankee*. The Eleventh Circuit completely disregarded the substantial procedural and statutory improprieties of HUD and by allowing undue judicial deference, erroneously granted summary judgment to HUD.

2. Invalidity of the Contested Regulation

It is submitted that the court below could only decide on the merits that the contested regulation was invalid.

First, it is an interim regulation which provided specifically that comments would be received by HUD for a period of 30 days, that HUD would consider same and would issue a final regulation. 44 F.R. 56608-9. Similarly, HUD's general regulations on rule making require issuance of a final substantive regulation. 24 CFR 10.1, April 1, 1979 ed. No final regulation was issued. Under *Morton* v. *Ruiz*, 415 U.S. 199, 232-5 (1974), the agency must comply with its own regulations; and if it fails to do so, its administrative action is invalid.

Second, under the APA, HUD was required to proceed with reasonable promptness to the issuance of a final regulation after comments have been received, 5 USC 553. It has not to this day done so.

Third, HUD made the interim regulation retroactive, and the so-called Mandalay regulation was designed to prevent the Cooperative from being grandfathered in under the preceding

regulation. 24 CFR 290.3. Retroactive regulations are invalid, absent some overwhelming justification. *Citizens to Save Spencer County* v. *U.S. Environmental Protection Agency*, 600 F.2d 844, 879-880 (D.C. Cir. 1979). There is no such justification shown in the record here, and the regulation is invalid.

Fourth, the October 1, 1979 regulation was a revocation of a pre-existing regulation dating back to 1977. The 1979 revocation made no explanation or justification for reversing HUD's preceding regulation and, at the same time, its operating manuals and procedures. In the absence of such proper explanation or justification, the revocation is invalid. *The Greyhound Corporation* v. *I.C.C.*, 551 F.2d 414, 416 (D.C. Cir. 1977). No such explanation or justification was made.

Fifth, under 42 USC 3535(o), which specifically is applicable to HUD, it is required to leave the proposed interim regulation on the tables of the Senate and House committees which govern HUD's regulations and wait for the appropriate periods of time prior to the regulation becoming effective. HUD failed to do so.

Sixth, under 42 USC 3535(o)(3), the regulation is not to be effective until after it becomes final. The legislative history of the statute showed Congress sought this review period because HUD had persistently usurped legislative power when it disagreed with the intent of the laws passed by the Congress. 124 *Cong. Rec.* 11268 (1978), remarks of Senator Schmitt who introduced the amendment.[3] The interim regulation never became a final regulation.

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[3] There is presently pending before the Court a petition for writ of certiorari on the issue of the one-house veto by Congress of proposed regulations by an administrative agency, in the case entitled *Consumer Energy Council of America* v. *F.E.R.C.*, 673 F.2d 425 (D.C. Cir. 1982); Sup. Ct. Nos. 81-2020, 81-2151, 81-2171. If the Court should determine to grant the petition to review the decision of the D.C. Circuit, it is suggested that the petition in the instant case be granted similarly and the cases consolidated for a hearing on the issue which is also present here. HUD claimed the review provisions in 42 USC 3535 were invalid.

The Cooperative submits that the criteria for judicial review of the interim regulation which were used below are invalid and in conflict with the decisions of this Court and other circuits.

B. HUD's Arbitrary and Capricious Administration of Sec. 246

The Cooperative challenged before the court below HUD's arbitrary and capricious administration of Sec. 246, contrary to its plain meaning and the intent of Congress. It was pointed out that the statute was enacted to foster affordable home ownership by the tenants in HUD-held projects. This was to be an alternative to HUD's previous procedure of selling by competitive bid in a manner which made purchase by nonprofit cooperatives impossible and resulted in HUD's dealing exclusively with profit-motivated professional real estate investors and speculators.

The Cooperative alleged that HUD wished to do this because its officials felt more comfortable dealing with real estate professionals than with many amateur cooperative members.

Finally, and most important, the Cooperative showed that HUD had admitted that only one project, out of hundreds sold by HUD since 1974, was sold under Sec. 246. The Cooperative also pointed to HUD's resistance to negotiated sale of this Project to the Cooperative, after first encouraging the Cooperative to anticipate the sale; and to HUD's refusal to decide whether such a sale was in the Government's best interests and in conformity with Congressional intent. As was noted earlier, HUD stated only that it had no authority to negotiate the sale to the Cooperative, relying solely on the invalid regulation of October 1, 1979. HUD refused to decide on the merits whether the Cooperative should be allowed to buy. The Cooperative also pointed out that Congress had stated as part of the legislative history of Sec. 246 that Congress intended that HUD should sell a "substantial" number of projects to cooperatives under Sec. 246.

Although HUD's 1977 regulations made it clear that HUD would consider a negotiated sale to a tenant cooperative, and its

handbooks and manuals so stated, HUD did not intend to make Sec. 246 sales. HUD's regulations failed to include a role for the Special Assistant for Cooperative Housing, one of the few statutory positions in HUD other than the Secretary's position itself. This statute, which was enacted in 1955 provided that:

> "In the performance of, and with respect to, the functions, powers and duties vested in him by (*inter alia*) . . . section 246 . . . of the National Housing Act . . . , the Secretary of Housing and Urban Development, notwithstanding the provisions of any other law, shall appoint a Special Assistant with adequate staff, whose sole responsibility will be to expedite operations under such sections and to eliminate obstacles to the full utilization of such sections under the direct supervision of the Commissioner and Assistant Secretary for Housing Management. The person so appointed shall be fully sympathetic of the purposes of such sections." 12 USC § 1715(e). (Parenthetical material supplied.)

The Special Assistant played no role in the Sec. 246 program and contrary to Sec. 1715(e), had been downgraded so that there was not "adequate staff" to help cooperatives buy HUD-held projects.

This failure was compounded by HUD's invalid October 1, 1979 regulation. This regulation purported to limit such negotiated sales to formerly subsidized cooperatives, which were the cooperatives in greatest need of special assistance in order to prepare for, present, and consummate a negotiated sale.

The District Court refused to consider the issue of whether HUD had acted arbitrarily and capriciously in its administration of the statute, stating that this was a matter which the Cooperative should take up with the Congress. 9a fn. The District Court also relied on the fact that HUD had discretion under the statute and consequently, no particular cooperative had any right to a negotiated sale under Sec. 246. The District

Court's position, of course, made it impossible for any cooperative ever to obtain judicial review. The Secretary himself took a broader position and argued, as Secretaries of HUD had done many times before, that he had unbridled discretion and his discretion was not subject to judicial review. But the result of either position is the same—the Cooperative was denied judicial review. The Eleventh Circuit affirmed the District Court without discussing this issue.

On this issue the decision below is in irreconcilable conflict with the decisions of this Court and other circuits. As pointed out in the earlier section on the interim regulation, this Court has held many times that arbitrary and capricious actions by administrative agencies under a statute are subject to judicial review, in the absence of the most clear and convincing evidence that the statute by its very own terms provides otherwise. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967); *Citizens to Protect Overton Park* v. *Volpe,* 401 U.S. 402 (1971); *Ass'n. of Data Processing Orgns.* v. *Camp,* 397 U.S. 150, 156-57 (1970).

The Secretary's contention, that HUD is vested with unbridled discretion in determining whether to implement a precatory statute, was struck down by several circuits. As was indicated *supra,* this issue was decided contrary to the Secretary's contention in *Russell* v. *Landrieu,* 621 F. 2d 1037, 1041 (9th Cir. 1980). Similarly, the 9th Circuit in *Abrams* v. *Hills,* 547 F. 2d 1062 (9th Cir. 1976) ruled against the same contention by the Secretary as to an "operating subsidy" program. There, as here, the Secretary contended that ". . . she is vested with complete discretion in determining whether to implement the program." The Ninth Circuit stated that although the statute was couched in "precatory" terms, that the Secretary is authorized to make and contract to make payment of the operating subsidies, Congress did not mean to give the Secretary unfettered discretion. 547 F. 2d at 1067. This Court granted certiorari, consolidating the case with another one on the same issue, *Harris* v. *Ross,* 544 F. 2d 514 (4th Cir. 1976), and setting them for hearing for a total of one hour for oral

argument, 431 U.S. 928. Subsequently, the cases were closed, on motion of the Solicitor General and with consent of respondents, for reference to the district courts in Maryland and California to consider the settlement which had been made by HUD and the parties in these cases. 439 U.S. 1001.

Nevertheless, HUD still claims unfettered and unbridled discretion, and the decision below erroneously went along with this contention. Sec. 246 is precatory, as is true of most, if not all, the insuring and operating sections of the Act. But this is no justification for HUD's making a dead letter of Sec. 246 and claiming the courts have no power to review HUD's conduct.

The Court should note that *Ross* v. *Community Services, Inc.*, 405 F. Supp. 831 (D. Md. 1975), affd. 544 F. 2d 514 (4th Cir. 1976) was the case that was consolidated with *Abrams* v. *Harris, supra,* under the name of *Harris* v. *Ross.* The District Court wrote (p. 834) that HUD does not claim that any reasons exist why plaintiffs would not qualify for subsidy payments, but HUD argued there, that the statute gave HUD "absolute discretion" to decline to make any subsidy payments. The District Court held that there was no merit to this contention. It held that a court should give no weight to agency interpretation that is not ". . . consistent with the congressional purpose . . .", relying upon *Morton* v. *Ruiz,* 415 U.S. 199, 237 (1974), or where there are "compelling indications that it is wrong." *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973). As the D.C. Circuit stated in *Pennsylvania* v. *Lynn,* 501 F. 2d at 861, Congress "cannot be put to the necessity of acting twice before it is taken to mean what it said in duly enacted legislation." Congress did act twice here, in 1974 and 1978, and HUD is still not convinced.

In sum, by refusing to consider judicially HUD's conduct in failing to administer Sec. 246, the decision below is in irreconcilable conflict with the cases cited above, and should be reversed. It is also suggested that the Court might consider deciding affirmatively that the discretion of HUD, in the precatory provisions of the National Housing Act and related statutes, is not an unbridled and unreviewable discretion, but is a limited or narrow discretion which is subject to review by the courts. *Pennsylvania* v. *Lynn,* 501 F. 2d 848 at 862 (D.C. Cir. 1974).

It is submitted that if HUD had but considered on the merits the pros and cons of a sale to the Cooperative under Sec. 246 as compared to other disposition, HUD would have negotiated the sale to the Petitioner. The purchase price would be fixed by HUD in accordance with Sec. 246; the Cooperative is tax-exempt and thus able to operate the Project most economically; it has ample assets to assure that the mortgage would be paid, and the residents overwhelmingly favored the Cooperative's purchase. Tenant displacement would be nil; the other statutory goals of affordable housing for elderly residents would be achieved. Ironically, HUD would have received a higher price than it received by competitive bid and not have been forced into a hold-harmless agreement. Nor would HUD have chosen a rental property disposition for a project which had failed twice as a rental property and which will now end as a high-priced condominium after the residents are displaced.

III

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS THAT CASES BE DECIDED ON THE STATE OF THE LAW AT TIME OF DECISION.

The Eleventh Circuit opinion addressed itself to a factual issue which the District Court had not discussed—whether HUD's conduct, and the Cooperative's reliance thereon to its detriment, constituted an equitable estoppel of HUD. The Eleventh Circuit cited a Court of Claims case which indicated that in the absence of dealings with a contracting officer, equitable estoppel would not lie against the Government. The opinion said that the Cooperative dealt with Ms. Melkonian, Deputy Assistant Secretary of HUD and other officials, but not with the Property Disposition Committee; that the Committee was solely empowered to sell the Project—hence, no equitable estoppel.

The Cooperative petitioned for rehearing. It was pointed out that both statute and regulations made it plain that authority to negotiate the sale of HUD-held projects was in the Secretary of HUD, and by delegation, in the Assistant Secretary

of HUD for Housing-FHA Commissioner, and his Deputy Assistant, Ms. Melkonian. The Cooperative averred that Ms. Melkonian had told the Cooperative that HUD would negotiate the sale of the Project. These officials were much higher in status and power in the Government than a contracting officer, and the Eleventh Circuit's reliance on the authority of the Property Disposition Committee was misplaced. The Cooperative noted that the Property Disposition Committee was, in fact, a mere administrative device and the Assistant Secretary by regulation always had authority to overrule the Committee and sell directly.

While the petition for rehearing was pending, the Assistant Secretary issued regulations on May 5, 1982, 47 F.R. 19471, abolishing the Property Disposition Committee; a newspaper article indicated that the Assistant Secretary himself was, in fact, negotiating sales of HUD-held projects directly. The Eleventh Circuit sustained the inclusion of this matter in the record as against HUD's motion to strike, but did not act upon it and denied without comment the motions for rehearing both to the panel and *en banc.*

In failing to grant the Cooperative's motion for rehearing, it is submitted that the Eleventh Circuit decision is in conflict with decisions of this Court and other circuits. The Eleventh Circuit was under obligation to decide the case in continuing litigation on the basis of law and regulations as they exist at time of decision. *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 272-274, 281-283 (1968); *Eikenberry* v. *Callaghan,* 653 F.2d 632 (D.C. Cir. 1981), which pointed out (653 F.2d at 635) that in *Thorpe, supra,* ". . . the Supreme Court applied to the case before it a circular ordered by the Department of Housing and Urban Development *after the Supreme Court had granted certiorari.*" (Emphasis in original).

Cooperative submits that the Eleventh Circuit could not have given the regulatory change of May 5, 1982, any consideration in reviewing its decision. If it had done so, the Eleventh Circuit would have reversed its decision. Hence, the decision below is in conflict with the decisions cited above.

The court below sanctioned HUD's arbitrary and capricious refusal to implement statutory protections granted to tenants where HUD sells multifamily housing projects. HUD's negative disposition policy with respect to qualified cooperators affects hundreds of projects worth hundreds of millions of dollars and located in practically every state. The far-reaching impact and public importance of assuring that HUD's policy is legally sound warrants review by this Court.

HUD's "interim regulation" if consistently applied poses a grave and continuing threat to thousands of elderly tenants of limited financial resources who live in HUD-held projects. The court below did not pass upon the legality of the "interim regulation" yet the effect of its opinion is to give HUD free rein to discriminate against nonprofit cooperatives. HUD's refusal to administer statutes passed for the protection of tenants compounds the difficulty of such tenants in being able to live in affordable housing. Unlike residents of public housing, Supreme Court decisions do not as yet extend sufficient protections to elderly residents of HUD-held projects. It is submitted that this Court should do so and this case provides an appropriate opportunity.

CONCLUSION

This Petition demonstrates that the United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with decisions of this Court and other Courts of Appeal. The issue in this case present important problems of federal law and matters of great national interest in HUD's disposition program of its many HUD-held projects in the several states. The need for a national policy on such sales or dispositions is great. For these reasons, Petitioner respectfully requests this Court to grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 3rd day of September 1982.

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